Supreme Court, U. S.
FILED
MAY 5 1980
MICHAEL RODAK, JR., CLERK

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

NO. 79-6150

JAMES MICHAEL MATHEWS,

Petitioner

v.

STATE OF OHIO,

Respondent

BRIEF IN OPPOSITION
TO PETITION FOR CERTIORARI

James R. Cooper
MORROW, GORDON & BRYD
33 West Main Street
P.O. Box 816
Newark, Ohio 43055
(614) 345-9611
ATTORNEY FOR PETITIONER

David E. Lighttiser
LICKING COUNTY PROSECUTORS OFFICE
501 Trust Building
Newark, Ohio 43055
(614) 345-0076
ATTORNEY FOR RESPONDENT

TABLE OF CONTENTS

	PAGE
JURISDICTIONAL STATEMENT	1
OPINION BELOW	1
STATEMENT OF THE CASE	2
ARGUMENT	2
CONCLUSION	10
PROOF OF SERVICE	11
APPENDIX A: OPINION OF THE COURT OF APPEALS FOR LICKING COUNTY, OHIO, FIFTH APPELLATE DISTRICT	12
APPENDIX B: STIPULATION OF FACT ENTERED INTO PRIOR TO AGGRAVATED MURDER TRIAL BY AND BETWEEN PETITIONER, HIS ATTORNEYS, AND COUNSEL FOR THE STATE OF OHIO	26
APPENDIX C: SECTION 2941.25 OF THE OHIO REVISED CODE	28

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

NO. 79-6150

JAMES MICHAEL MATHEWS,

Petitioner,

v.

STATE OF OHIO,

Respondent,

BRIEF IN OPPOSITION
TO PETITION FOR CERTIORARI

JURISDICTIONAL STATEMENT

Respondent is satisfied with Petitioner's jurisdictional statement.

OPINION BELOW

The copy of the opinion of the Court of Appeals for Licking County, Ohio, Fifth Appellate District, attached to the Petition for Writ of Certiorari is accurate except that the last sentence of page seven (7) of the opinion, found at page fifty-six (56) of the Petition, was inadvertently deleted during copying. A complete copy of the opinion is attached hereto as Appendix A.

STATEMENT OF THE CASE

Respondent agrees with petitioner's Statement of the Case except that prior to the murder trial petitioner asked the state to sign a stipulation of fact, which stated that the aggravated robbery for which petitioner had previously been convicted was the same aggravated robbery which was specified in the aggravated murder charge. This stipulation was signed only after the state added to the stipulation that the aggravated murder indictment also contained allegations of fleeing from the robbery and that the proof (in the aggravated murder trial) would go to defendant's conduct during such flight. This stipulation is attached as Exhibit B.

QUESTION PRESENTED

Respondent agrees that the question set out in petitioner's Petition is present, but this case also presents two other questions:

1. If two individuals commit a bank robbery and one robber purposely kills the other while fleeing from the robbery are the acts of robbery and murder the same for double jeopardy purposes or are the acts distinctly separate criminal offenses?

2. If, even under the facts present in this case, the robbery and the murder are the same acts for double jeopardy purposes, does this case fall within exceptions to the double jeopardy clause of the Fifth Amendment to the United States Constitution?

ARGUMENT

-A-

THE PROSECUTIONS IN THIS CASE FOR AGGRAVATED ROBBERY AND AGGRAVATED MURDER WERE BASED UPON SEPARATE AND DISTINCT CRIMINAL ACTS COMMITTED BY THE PETITIONER.

Petitioner argues that under the double jeopardy rule of Blockburger v. U.S., 284 U.S. 299, 76 L. Ed. 306 (1932) Brown v. Ohio, 432 U.S. 161, 53 L. Ed. 2d 187 (1977), and State v. Best, 42 Ohio St. 2d 530 (1975) the aggravated murder prosecution was barred because the petitioner had earlier been convicted of the aggravated robbery which was part of the aggravated murder charge.

It is not disputed by the State but that the petitioner was convicted of the aggravated robbery of the Alexandria Bank prior

to his trial for aggravated murder. Nor is it disputed but that in his aggravated murder trial the same aggravated robbery was the basis for the felony murder charge. However, it is not necessary or even proper to consider double jeopardy law in this case. Prior to petitioner's trial for aggravated murder, his counsel and counsel for the state entered into a "Stipulation of Fact" wherein it was stated that the aggravated robbery in the murder case was the same aggravated robbery that petitioner had earlier been convicted of, but then the stipulation recites, "The indictment in case no. 13940 (the aggravated murder case) includes allegations of fleeing from the same aggravated robbery and the proof will go to defendant's conduct during such flight." This stipulation is contained in the original court papers and is attached as Appendix B to this brief. This stipulation makes it clear that the prosecution was focusing on a separate criminal act committed by the petitioner during his flight from the robbery.

The double jeopardy test as set out in Blockburger, supra, and followed in Brown, supra, and Best, supra, is as follows:

> The applicable rule is that where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of fact which the other does not . . . Brown, supra, at 194, (Emphasis added)

Petitioner is urging this court to disregard that portion of the rule which requires that the same act or transaction be involved before double jeopardy is an issue. This cannot be done because it has long been recognized that the double jeopardy clause does not bar successive prosecutions for separate and distinct criminal acts. It was held in State v. Wallen, 21 Ohio App. 2d 27, 50 Ohio Opns. 2d, 50, affirmed 25 Ohio St. 2d 45 (1969):

> That a defendant has been put in jeopardy upon trial for one criminal act is no bar to a prosecution for a separate and distinct criminal act merely because such acts are closely connected in point of time, place, and circumstances. Wallen, supra, at 36.

and, in State v. Johnson, 112 Ohio App. 124, 16 Ohio Opns. 2d 51 it is stated:

> If the offenses charged are separate and distinct either with respect to statutory definition, or because, as charged, they grow out of different transactions . . . double jeopardy is not applicable.

The same rule has been stated in Dodge v. State, 125 Ohio St. 580, Duvall v. State, 111 Ohio St. 657 (1924), State v. Rose, 89 Ohio St. 383 (1914), Mitchell v. State, 42 Ohio St. 383, and State v. Orth, 106 Ohio App. 35, appeal dismissed 167 Ohio St. 388.

It seems obvious that the crime of aggravated murder and aggravated robbery are both separate and distinct charges and separate and distinct acts. The murder charge was based upon petitioner's actions against or toward another person; the robbery charge based upon his actions against the property of another. The acts are separate and the victims are separate and distinct. This fact alone distinguishes this case from the Brown decision where the criminal act was committed against only one person (the owner of the car) and the subject of the criminal act (the car) remained the same no matter how long Brown kept it or how many times he drove it.

The case at bar can be likened to Hoag v. New Jersey, 356, U.S. 464, 2 L. Ed. 2d 913 (1958) where the defendant held up five different tavern customers at the same time. He was first tried three separate times with each trial involving a different customer and he was acquitted each time. He was tried a fourth time and was convicted. The U.S. Supreme Court affirmed the conviction and held, "We do not think that the Fourteenth Amendment always forbids States to prosecute different offenses at consecutive trials even though they arise out of the same occurrence."

Also, see Cuicci v. Illinois, 356, U.S. 571, 2 L. Ed 2d 983 (1958), in which the defendant was charged in four separate indictments with killing his wife and three children. He was tried once and found guilty of murdering his wife. He was tried again and found guilty of murdering one of his children. In neither case did he receive the death penalty. He was prosecuted a third time, convicted and sentenced to death. The U.S. Supreme Court affirmed the conviction.

The foregoing cases illustrate that separate and distinct acts may be prosecuted in successive actions. This is because the first

part of the double jeopardy test requires that same act of transactions be involved before double jeopardy is an issue at all.

-B-

THE CASE OF BROWN V. OHIO, 432 U.S. 161, 53 L. Ed. 2d 187 (1977) ITSELF ILLUSTRATES THAT DOUBLE JEOPARDY DOES NOT APPLY:

The U. S. Supreme Court, in Brown, based its decision on the fact that the Ohio Court of Appeals had ruled that the crime of joyriding was a lesser included offense of auto theft. At page 195 of L. Ed. the Court stated:

> Here the Ohio Court of Appeals has authoritatively defined the elements of the two Ohio Crimes . . . joyriding is the lesser included offense. Brown, supra.

And, at page 196 of L. Ed.:

> After correctly holding that joyriding and auto theft are the same offense under the Double Jeopardy Clause, the Ohio Court of Appeals nevertheless concluded that Nathaniel Brown could be convicted of both crimes . . . Brown, supra.

Since only one offense was involved - as, according to the Supreme Court, - admitted by the Court of Appeals, double jeopardy applied.

However, the U. S. Supreme Court noted in footnote eight (8), at page 196 of L. Ed.:

> We would have a different case if the Ohio Legislature had provided that joyriding is a separate offense . . . We would also have a different case if in sustaining Brown's second conviction the Ohio Courts had construed the joyriding statute to have that effect. Brown, supra.

The U. S. Supreme Court, in this footnote, recognizes that Ohio courts, "have the final authority to interpret . . . that State's legislation." Garner v. Louisiana, 368, U.S. 157, 7 L. Ed. 2d 207 (1961).

In similar cases to the case at bar, Ohio courts have authoritatively ruled that felony murder and the underlying felony are separate offenses.

In Duvall v. State, 111 Ohio St. 657 (1924), the Ohio Supreme Court considered a case where the defendant had been tried first for the felony murder of one John C. Herbruck and acquitted. He was then

indicted and tried for the robbery of John C. Herbruck. Duvall was convicted of the robbery and the Supreme Court affirmed. It held, at page 669:

> We are of the opinion that the offense of murder in attempting to perpetrate a robbery and the offense of robbery are separate and distinct offenses, and a general verdict of not guilty returned by the jury under the former charge . . . murder . . . is not necessarily an ajudication of . . . guilt . . . of robbery. Duvall, supra.

This approach was also followed in State v. Orth, 106 Ohio App. 35 (1957) when the defendant was first tried and acquitted of felony murder. He was then indicted, tried, and convicted for the underlying felony which was robbery. The Court of Appeals held that the second conviction was proper. An appeal to the Ohio Supreme Court was dismissed. State v. Orth, 167 Ohio St. 388.

The Court of Appeals for Licking County, Ohio, recognizes that under Ohio law aggravated robbery is not a lesser included offense of an aggravated murder charge. See pages 2 and 6 of their opinion found in Appendix A to this Brief.

It should also be noted that the Duvall case was cited and followed in State v. Best, 42 Ohio St. 2d. 530 (1975).

These cases illustrate that Ohio courts have ruled that felony murder and the underlying felony are separate and distinct offenses and even under the test in the Brown case, double jeopardy does not apply.

-C-

EVEN UNDER THE "REQUIRED EVIDENCE TEST" OF BLOCKBURGER AND BROWN THE AGGRAVATED MURDER PROSECUTION OF THE APPELLANT IS NOT DOUBLE JEOPARDY:

The double jeopardy test as set out in Blockburger and followed in Brown is often referred to as the "required evidence test." Each provision under consideration must require proof of a fact which the other does not. Appellant contends that this test cannot be met in the case at bar. However, he has confused the "required evidence" test with the "actual evidence test," the latter having been rejected by the U.S. Supreme Court in Harris v. U.S. 359, U.S. 19, 3 L. Ed 2d 597 (1959). Attention in the "required evidence test" is focused upon the evidence demanded by the definition of the offense. Attention

in the "actual evidence test" is focused on the evidence presented at trial.

The required evidence under Ohio's felony murder statute is that the defendant purposely caused the death of another while committing, attempting to commit or in fleeing immediately after committing or attempting to commit kidnapping, rape, aggravated arson or arson, aggravated robbery or robbery, aggravated burglary or burglary, or escape. Ohio Revised Code Section 2903.01 (B). The required evidence under the aggravated robbery statute is that the defendant in attempting or committing a theft offense, or in fleeing immediately after such attempt or offense did have a deadly weapon on or about his person or inflicted or attempted to inflict serious physical harm on another. Ohio Revised Code Section 2911.01.

It can easily be seen that the required evidence under Ohio's felony murder statute may include aggravated robbery but also may include evidence of some eight other felonies other than aggravated robbery. This, murder plus a listed felony, is the required evidence. The required evidence is not only murder plus aggravated robbery. This is the definition of felony murder. The fact that the actual evidence (that produced at trial) may overlap with a prior trial for the underlying felony makes no difference because the required evidence - that required by the definition of the offense - is murder plus a listed felony and not only murder plus aggravated robbery.

-D-

THE OFFENSES UNDER CONSIDERATION EACH REQUIRE A DIFFERENT DEGREE OF CULPABILITY SO THAT EACH PROVISION DOES REQUIRE PROOF OF A FACT WHICH THE OTHER DOES NOT.

Although the aggravated robbery statute, Ohio Revised Code Section 2911.01 does not itself contain a "culpable mental state," one Ohio case, State v. Bumphus, 53 Ohio App. 2d 171 (1976) has held that the required mental state or culpability is that the accused act "knowingly."

The required mental state or culpability required for a felony murder conviction is that the accused act "purposely.", Ohio Revised Code 2903.01 (B).

Purposely is not required in the aggravated robbery statute and knowingly is not required in the aggravated murder statute so each provision does require proof which the other does not.

-E-

THE UNDERLYING FELONY IN A FELONY MURDER CHARGE IS NOT A LESSER INCLUDED OFFENSE BUT IT MERELY CHARACTERIZES THE OFFENSE AS TO DEGREE.

Under Ohio law, a homicide, if done purposely, is murder. If done purposely and with prior calculation and design, it is aggravated murder. If committed purposely and while committing or attempting to commit a listed felony it is also aggravated murder. This illustrates that the underlying felony in Ohio's felony murder scheme is not a lesser included offense of aggravated murder but only characterizes the offense as to degree - aggravated murder instead of murder. This conclusion has been reached in other jurisdictions. See People v. Nichols, 129 N.E. 883 (1921); People v. Lytton, 178 N. E. 290 (1931); State v. Briggs, 533 S.W. 2d 290 (1976).

This conclusion is even more appropriate when one considers that Ohio follows a "modified" felony murder rule. It is not enough to prove simply murder plus felony. It still must be proved that the murder was committed purposely. The murder is, therefore, premised on independent proof that the killer acted with a purpose. This means that the offenses are separate and distinct. See Newton v. State, 373 A 2d 262 (1977).

-F-

THE CASE AT BAR FALLS UNDER A RECOGNIZED EXCEPTION TO THE DOUBLE JEOPARDY CLAUSE:

At footnote seven (7) page 196, of Brown v. Ohio, 53 L. Ed. 2d 187 (1977), the U. S. Supreme Court notes that to the double jeopardy rule:

> An exception may exist where the State is unable to proceed on the more serious charge at the outset because the additional facts necessary to sustain that charge have not occurred or have not been discovered despite the exercise of due diligence. See Diaz v. U.S. 223, U.S. 442, 56 L. Ed. 500 (1912). Brown, supra.

This rule is often applied where the defendant is first tried for the underlying felony but after that trial the victim of the felony dies. See State v. Ross, 2 ONP 368, 4 ODNP 5.

In the case at bar, the petitioner was convicted of aggravated robbery on May 17, 1978, (Tr, 6 Pretrial motions). However, on May 19, 1978, and again on May 25, 1978, the petitioner made statements to a Licking County deputy sheriff who recorded the statements

(Tr 615). This tape was played to the jury at trial. (Tr 616). Also, on May 19, 1978, and on May 25, 1978, the petitioner gave the officer written statements (Tr 617-618). The tape recording was admitted as State's Exhibits 78 and 79. In the recorded and written statements the petitioner also admitted to having shot his bank robbery partner with a sawed-off shotgun.

By the dates of the statements (May 19th and 25th) it is obvious that they were made after the petitioner had been tried and convicted of the bank robbery. Apparently, the petitioner felt he could confess to murder and suffer no consequences.

These confessions are "additional facts" which the prosecution did not have when the petitioner was indicted, tried and convicted of aggravated robbery. The only statement the petitioner made at the time of his arrest was that he had been forced at gun point to commit the bank robbery by Daugherty (the deceased) and that a third party named "Cliff" was involved. Petitioner stated he was outside the house when Daugherty killed himself. (Tr 573-596).

As noted above in his statements of May 19, 1978, and May 25, 1978, the petitioner does admit to the murder of his accomplice. Since this fact - a confession - was not available at the time of petitioner's indictment and trial on aggravated robbery this cause fits squarely within an exception to the double jeopardy provisions of the United States and Ohio Constitutions.

-G-

SINCE UNDER OHIO LAW A DEFENDANT MAY BE CHARGED IN THE SAME INDICTMENT WITH BOTH FELONY MURDER AND THE UNDERLYING FELONY PURSUANT TO REVISED CODE 2941.25 HE IS NOT PREJUDICED BY THE FACT THAT HE IS CHARGED WITH SUCH CRIMES IN SUCCESSIVE INDICTMENTS.

Ohio Revised Code Section 2941.25 provides in pertinent part:

> (B) Where the defendant's conduct constitutes two or more offenses of dissimilar import, or where his conduct results in two or more offenses of the same or similar kind committed separately or with a separate animus as to each, the indictment of information may contain counts for all such offenses, and the defendant may be convicted of all of them.

Murder is a crime against the person; robbery is a crime against property. Clearly, a defendant who commits murder during the course of a robbery acts with a separage animus during the robbery as opposed

to the murder. He could be charged, therefore, with both crimes in the indictment.

This being true, then he is not prejudiced by successive prosecutions. Double jeopardy would not bar the successive prosecutions unless "mandatory joinder" of all causes of actions theory was the accepted test. Such a theory has been considered but rejected by the U.S. Supreme Court.

CONCLUSION

For the reasons stated, petitioners rights under the Fifth Amendment to the United States Constitution were not violated. The United States Supreme Court should deny certiorari in this matter.

Respectfully submitted,

David E. Lighttiser
Prosecuting Attorney
Licking County, Ohio
501 Trust Building
Newark, Ohio 43055
(614) 345-0076
ATTORNEY FOR RESPONDENT

PROOF OF SERVICE

A copy of the foregoing Brief in Opposition to the Petition for Writ of Certiorari was served upon James R. Cooper, 33 West Main Street, P.O. Box 816, Newark, Ohio 43055, attorney for petitioner, this 6 day of May, 1980.

David E. Lighttiser
ATTORNEY FOR RESPONDENT

APPENDIX A

IN THE COURT OF APPEALS FOR LICKING COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	
Plaintiff-Appellee	:	JUDGMENT ENTRY
vs.	:	CASE NO. CA-2578
JAMES MICHAEL MATHEWS	:	
Defendant-Appellant	:	

For the reasons as stated in the Memorandum-Opinion on file, all assigned errors are overruled, the judgment of the Court of Common Pleas of Licking County, Ohio, is affirmed and this cause is remanded to that Court for Execution of sentence.

Norman J. Putman

David D. Dewalt

Robert E. Cook

JUDGES.

IN THE COURT OF APPEALS

FIFTH APPELLATE DISTRICT

LICKING COUNTY, OHIO

STATE OF OHIO,

Plaintiff-Appellee, Case No. CA 2578

- vs -

JAMES MICHAEL MATHEWS,

Defendant-Appellant. O P I N I O N

COOK, J.,

This is an appeal from a judgment of the Licking County Common Pleas Court of the conviction and sentence of appellant for the crime of aggravated murder (R.C. 2903.01).

On February 17, 1978 appellant and one Steven Daugherty robbed the Alexandria Bank at Alexandria, Ohio. They left the scene in a blue van which was followed by Chief David Allen of the St. Louisville Police Department to the residence of a family named Newhouse. After a short time, appellant came out of the house and surrendered to the police. After appellant was in custody, the police entered the farmhouse and found Steven Daugherty dead.

Appellant was later indicted for aggravated murder in that he purposely caused the death of Steven Daugherty, while committing, attempting to commit or fleeing immediately after committing or attempting to commit aggravated robbery. He was convicted on September 1, 1978 and sentenced to life imprisonment.

Appellant has appealed his conviction and sentence to this court and filed twelve assignments of error. The assigned errors are without merit.

Appellant's first assignment of error is as follows:

> "The trial court erred in overruling appellant's motion to dismiss the indictment."

In support of this assigned error, appellant argues the indictment for aggravated murder placed him in double jeopardy in violation of the 5th Amendment of the United States Constitution and Article I, Section 10 of the Ohio Constitution because he had earlier entered a plea of guilty to the offense of aggravated robbery.

The Supreme Court of Ohio, in Duvall v. State, 111 Ohio St. 657 addressed itself to this problem and, in paragraph one of its syllabus, held:

> "1. An acquittal of a defendant upon the charge of murder in the first degree, while attempting to perpetrate a robbery (under Section 12400, General Code) is not a bar to a prosecution for the crime of robbery (under Section 12432, General Code), even though committed upon the same person named in the former charge, and the robbery was a part of the same criminal act referred to in the indictment for murder."

Clearly a defendant may be charged with both felony murder and the underlying felony, as in the instant case.

Appellant's second assignment of error is as follows:

> "The trial court erred in refusing to allow William Howison, a polygraph expert, to testify on behalf of the defense."

As to the admissibility of the results of a polygraph test in

a criminal case, the Supreme Court of Ohio, in State v. Souel, 53 Ohio St. 2d 123 held:

> "The results of a polygraphic examination are admissible in evidence in a criminal trial for purposes of corroboration or impeachment, provided that the following conditions are observed:
>
> (1) The prosecuting attorney, defendant and his counsel must sign a written stipulation providing for defendant's submission to the test and for the subsequent admission at trial of the graphs and the examiner's opinion thereon on behalf of either defendant or the state.
>
> (2) Notwithstanding the stipulation, the admissibility of the test results is subject to the discretion of the trial judge, and if the trial judge is not convinced that the examiner is qualified or that the test was conducted under proper conditions he may refuse to accept such evidence.
>
> (3) If the graphs and examiner's opinion are offered in evidence the opposing party shall have the right to cross-examine the examiner respecting:
>
> (a) the examiner's qualifications and training;
> (b) the conditions under which the test was administered;
> (c) the limitations of and possibilities for error in the technique of polygraphic interrogation; and,
> (d) at the discretion of the trial judge, any other matter deemed pertinent to the inquiry.
>
> (4) If such evidence is admitted the trial judge should instruct the jury to the effect that the examiner's testimony does not tend to prove or disprove any element of the crime with which a defendant is charged, and that it is for the jurors to determine what weight and effect such testimony should be given."

A reading of the Souel case clearly indicates the Court contemplates the admissibility of the results of one polygraph test by the testimony of one expert witness with adequate safeguards to

the opposing party.

Under such guildelines, the trial court properly refused to allow the appellant to call an expert witness of his own to attempt to discredit the testimony of the expert witness agreed upon by the parties.

Appellant's third assignment of error is as follows:

> "The trial court committed error in refusing to grant defendant's motion for acquittal made at the close of the State's case, and renewed at the close of all the evidence and in refusing to instruct the jury that suicide was the legally accepted manner and mode in which the death of Steven Daugherty occurred, and the legally accepted cause of death."

In support of this assignment of error, appellant argues that the finding that the death of Steven Daugherty was suicide, as set forth in the death certificate issued by the Licking County Coroner, was the legal cause of death and, for that reason, the trial court erred in not granting his motions for acquittal and in refusing to give a requested jury instruction to that effect.

R.C. 313.19 states:

> "The cause of death and the manner and mode in which the death occurred, as delivered by the coroner and incorporated in the coroner's verdict and in the death certificate filed with the division of vital statistics, shall be the legally accepted manner and mode in which such death occurred, and the legally accepted cause of death, unless the court of common pleas of the county in which the death occurred, after a hearing, directs the coroner to change his decision as to such cause and manner and mode of death."

However, a death certificate, as in the instant case, is not a coroner's verdict as contemplated by R.C. 313.19. R.C. 313.19

must be read in paria materia with R.C. 313.17 which gives a county coroner the right to hold an inquest to determine the cause of death. A coroner's verdict is the result of such an inquest. No such inquest was held in the instant cause so there was no coroner's verdict.

Absent a coroner's verdict, an expression by a coroner as to the cause of death is merely an expression of his opinion, but it does not constitute the legal cause of death called for by R.C. 313.19.

Appellant's fourth, fifth, sixth, seventh and eighth assignments of error complain about the court's instructions to the jury and are as follows:

> "4. The trial court committed error in refusing to instruct the jury that a coroner's verdict as to the cause of death and the manner and mode in which the death occurred is entitled to much weight.
>
> 5. The trial court erred in its failure to instruct the jury on the offense of aggravated robbery, a lesser included offense.
>
> 6. The trial court committed error in refusing to instruct the jury on the lesser included offense of voluntary manslaughter.
>
> 7. The trial court committed error in refusing to instruct the jury on the lesser included offense of involuntary manslaughter.
>
> 8. The trial court committed error in giving an instruction to the jury on the issue of "fleeing" which was submitted by the State."

As to the instruction in re the "coroner's verdict", the trial court properly refused to give the requested instruction for the reason set forth above as to the third assignment of error.

As to the failure of the trial court to instruct the jury as to the offense of aggravated robbery, the trial court did not err in refusing to so charge the jury because aggravated robbery is not an included offense of a felony murder for the reasons set forth above as to the first assignment of error.

As to the failure of the trial court to instruct the jury on voluntary and involuntary manslaughter, the trial court did not err since the evidence did not support such charges. A charge on an included offense is to be given only when the evidence supports such a charge. State v. Long, 53 Ohio St. 2d 91; State v. Nolton, 19 Ohio St. 2d 133.

As to the giving of the State's requested instruction as to the crime of robbery, the trial court did not err since the stipulation of fact entered into by the parties stated "The offense supporting the allegations of aggravated robbery in the indictment for aggravated murder in case no. 13940, Licking County Common Pleas Court, State v. Mathews (contained in the original papers in the court file in the within matter) consists of this same aggravated robbery of the Alexandria Banking Company, Alexandria, Ohio, on the 17th day of February, 1978. The indictment in case no. 13940 includes allegations of fleeing from the same aggravated robbery and the proof will go to defendant's conduct during such flight."

Under such a stipulation of fact, the trial court could and did charge the jury as to what constituted the crime of robbery.

Appellant's ninth assignment of error is as follows:

> "The trial court erred in overruling appellant's motion to dismiss the indictment and to suppress all statements made by

> appellant before the Licking County Grand Jury."

This assigned error is without merit. Appellant waived his 5th Amendment rights before he testified before the grand jury. When asked if he had an attorney, appellant replied "Well, what I have got to say I don't need an attorney right now." (Tr 29, pre-trial motions).

We conclude appellant made voluntary statements to the grand jury. There was no evidence that Mr. Cooper, who represented him at the time of his plea to the aggravated robbery charge, was appointed to handle any appeal from his conviction for the aggravated robbery. When told of his right to counsel and asked if he wanted one, appellant indicated he didn't need an attorney.

Appellant's tenth and eleventh assignments of error are as follows:

> "10. The trial court committed error in overruling appellant's motion to suppress the statements given by him to law enforcement authorities on May 19, 1978, and May 25, 1978,
>
> 11. The trial court committed error in overruling appellant's motion to suppress the statements given by him to law enforcement authorities on February 17, 1978, February 18, 1978, and February 19, 1978."

These assignments of error are without merit. As to the statements of May 19, 1978 and May 25, 1978, appellant was not only advised of his rights to remain silent and to have a lawyer present and signed written waivers of said rights, but the man to whom he gave the statements on May 19th, Sergeant Eisel, was requested by appellant to come to him in the Licking County jail. Clearly appellant's statements were knowingly and voluntarily made. As to

the statements of February 17 and 19, 1978, the record indicates appellant was advised of the Miranda rights and waived said rights. On February 19, 1978 appellant requested Sgt. Eisel to come to talk to him. On both occasions he signed a written waiver of his rights. Each time appellant indicated to the officers he understood his right and he so testified at the suppression hearing (Pgs. 41 and 45 of Transcript of Pre-trial Motions). On page 46 of said transcript, appellant testified his statement of February 19th was voluntarily made.

Appellant contends he asked for counsel on February 17th, but this was denied by Mr. Lighttiser, the Prosecuting Attorney of Licking County, who was questioning him. The trial court found the appellant waived his rights.

Appellant's twelth assignment of error is as follows:

> "The trial court committed error in overruling appellant's motions for judgment of acquittal at the close of the State's case and at the close of all the evidence."

This assignment of error is without merit. The felony murder statute, R.C. 2903.01(B) does not contain any exceptions. The evidence clearly indicates appellant killed Daugherty to keep for himself the money taken from the bank. This was a pruposeful killing during the perpetration of an

aggravated robbery or fleeing from an aggravated robbery and falls within R.C. 2903.01(B).

A bank teller testified the robbery took place at approximately twenty minutes before 2 P.M. on February 17, 1978 (R. 127-128). Chief Allen, who gave chase, noted that he spotted the blue van on State Route 13 at approximately 2:20 P.M. the same day (R. 149). That is 40 minutes later. He gave immediate chase and followed the van to the Newhouse farm located in the same county. The two men exited the van, ran into the Newhouse residence and thereafter one man emerged declaring he had a hostage.

Allen testified that in the interim he thought he heard gunfire from inside the house. The entire transaction ended at 2:32 P.M. that day when appellant surrendered.

In the case of *State v. Habig (1922), 106 Ohio St. 151,* the following language appears at page 160 from which the court's charge, in the case at bar, was "lifted" verbatim. This is the portion of the charge unsuccessfully challenged in the 8th assignment of error in the case at bar. It reads:

> ".....Though the crime of robbery is complete with only a slight asportation, yet, if the carrying away is in fact a long distance, the crime is still in process of commission if pursuit of the robber is immediately begun and continued without interruption until the flight has carried the perpetrator to a place of seeming security, or until

> uninterrupted pursuit is no longer continuously active. The mere fact of delay in beginning the pursuit until an alarm can be sounded and pursuit organized and instituted does not necessarily segregrate the flight and prevent it being part and parcel of the crime. ...."

The point of the 12th assignment of error is that the robbery was concluded and that also all flight had ended as a matter of law.

We disagree.

We see no reason to believe the legislative purpose was to reduce law enforcements range or to reduce the size of the umbrella of protection of persons from violence.

We see no reason to conclude that there is no legislative purpose to include fellow thieves within the laws protective ambit. After all, todays accomplice is tomorrows state's witness. The execution of a fellow criminal is a crime against the administration of justice because all such persons are potential witnesses.

Secondly, under *Habig, supra,* it is arguable that the robbery itself was not yet concluded in the case at bar. We distill from the added statutory words "or while fleeing immediately after..." a clear legislative purpose to lengthen

the arm of the law.

Accordingly, the 12th assignment of error is overruled.

Judgment affirmed.

Robert E Cook

ROBERT E. COOK, J.
Sitting by assignment from the
Eleventh Appellate District

Putman, P.J. and
Dowd, J. concur.

Norman J Putman

David D Dowd Jr.

Putman, P.J., and

Dowd, J., Concur

Atty. James R. Cooper and Steven T. Greene, 33 W. Main St., P.O. Box 816, Newark, Ohio 43055

- For Defendant-Appellant.

Atty. Robert L. Becker and Raymond P. Luther, Prosecuting Attorney Office of Licking County, Courthouse, Newark, Ohio 43055

- For Plaintiff-Appellee.

APPENDIX B

IN THE COMMON PLEAS COURT OF LICKING COUNTY, OHIO

1978 DEC -7 AM 11:05

22 A 9:46

State of Ohio

PLAINTIFF

vs.

Case No. 78-A-13940

James Michael Mathews

DEFENDANT

STIPULATION OF FACT

The prosecution and the defense in this matter, with the consent of the defendant, hereby enter into the following stipulations:

1. The offense supporting the indictment on the Second Count in case no. 13871, Licking County Common Pleas Court, State vs. Mathews (Exhibit A to Motion to Dismiss Indictment filed herein) consisted of the aggravated robbery of the Alexandria Banking Company, Alexandria, Ohio, on the 17th day of February 1978.

The offense supporting the allegations of aggravated robbery in the indictment for aggravated murder in case no. 13940, Licking County Common Pleas Court, State vs. Mathews (contained in the original papers in the Court file in the within matter) consists of this same aggravated robbery of the Alexandria Banking Company, Alexandria, Ohio, on the 17th day of February 1978. The indictment in Case No. 13940 includes allegations of fleeing from this same aggravated robbery and the proof will be to that end to conduct during such flight.

The defendants in both of these above named cases are one and the same individual.

2. The defendant herein was convicted in case no. 13871 of the aggravated robbery referred to above on May 17, 1978.

JUDGE

APPROVED:

Robert L. Becker
Assistant Prosecuting Attorney
ATTORNEY FOR PLAINTIFF

Steven T. Greene
ATTORNEY FOR DEFENDANT

James R. Cooper
ATTORNEY FOR DEFENDANT

DEFENDANT

APPENDIX C

§ 2941.22 Averments [in indictment] as to will or codicil.

In an indictment or information for stealing a will, codicil, or other testamentary instrument, or for forgery thereof, or, for a fraudulent purpose, keeping, destroying, or secreting it, whether in relation to real or personal property, or during the life of a testator or after his death, it is not necessary to allege the ownership or value thereof.

(See former Gen. Code § 13437-21.)

§ 2941.23 Averments [in indictment] as to election.

In an indictment or information for an offense committed in relation to an election, it is sufficient to allege that such election was authorized by law, without stating the names of the officers holding it or the person voted for or the offices to be filled at the election.

(See former Gen. Code § 13437-22.)

[The next section is 2941.25.]

§ 2941.25 Multiple counts [in indictment].

(A) Where the same conduct by defendant can be construed to constitute two or more allied offenses of similar import, the indictment or information may contain counts for all such offenses, but the defendant may be convicted of only one.

(B) Where the defendant's conduct constitutes two or more offenses of dissimilar import, or where his conduct results in two or more offenses of the same or similar kind committed separately or with a separate animus as to each, the indictment or information may contain counts for all such offenses, and the defendant may be convicted of all of them.

(As amended effective Jan. 1, 1974. See also Crim. R. 8(A), 14.)

§ 2941.26 Variance.

When, on the trial of an indictment or information, there appears to be a variance between the statement in such indictment